IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 4956 of 2005
With
CIVIL APPLICATION No. 7523 of 2006
In
SPECIAL CIVIL APPLICATION No. 4956 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE AKIL KURESHI

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

AHMEDABAD DISTRICT CO-OP PURCHASE AND SALE UNION LTD - Petitioner(s)
Versus
GUJARAT STATE CO-OP BANK LTD & 12 - Respondent(s)

==========

Appearance :
MR BN PATEL for Petitioner
MR SHIRISH JOSHI for Respondent(s) : 1, 2, 4,
MS ARCHANA U AMIN for Respondent(s) : 3
MR SUNIT SHAH, GP for Respondent(s) : 5 & 6,
MR KG VAKHARIA, SR. ADVOCATE WITH MR MK VAKHARIA for Respondent(s) : 7 to 13.

==========

CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI

Date : 19/07/2006

ORAL JUDGMENT

1. This petition has been filed by the Ahmedabad District Cooperative Purchase and Sale Union Limited (hereinafter to be referred to as "the petitioner Union") primarily challenging the cooption of members in the Managing Committee of various specified cooperative societies which according to the petitioner is contrary to the provisions contained in section 74C(3) of the Gujarat Cooperative Societies Act, 1961 (hereinafter to be referred to as "the said Act").

2. The petitioner is a cooperative society registered under the Gujarat Cooperative Societies Act. It is a district level cooperative society having area of operation in the whole district of Ahmedabad. The petitioner also happens to be a specified cooperative society under section 74-C of the said Act. The petitioner, in turn, is a member of several cooperative societies including respondent No.1 to 4 co-operative societies. These respondents i.e. respondent Nos.1 to 4 are also specified co-operative societies. It is the case of the

petitioner that being specified societies, elections to the Managing Committee of these societies are required to be held as provided in section 74C of the said Act. It is the primary contention of the petitioner that in view of the provisions contained in sub-section (3) of section 74C of the said Act, the Managing Committee of the society can be constituted only through election and by no other mode. It is the case of the petitioner and to which there is no series dispute raised by the respondents that respondents Nos.1 to 4 have been nominating members in the Managing Committee of the society through co-option. Through different bye-laws framed by the respective societies, such power of cooption has been granted to the Committee itself. It is this mode of nominating members to the Committee through cooption by the Committee itself which the petitioner objects to on the ground that the same is impermissible in view of the provisions of section 74C(3) of the said Act.

3. The petitioner relies on the decision of the

learned single Judge of this Court in the case of A.M.P.Co-op. Society v. S.K.Dist. Coop Milk Producers Union Ltd., 2004 (1) GLR 310. In the said decision, learned single Judge of this Court had come to the conclusion that bye-laws framed by the society cannot prevail over the provisions contained in sections 74B and 74C of the said Act. It was held that the provisions made under bye-laws for cooption of three women representatives as members of the Managing Committee are in contravention of the provisions contained in section 74C(3) of the said Act.

4. On the other hand, the case of respondents Nos.1 to 4 i.e. the specified cooperative societies as well as other individual private respondents who are members of such societies through co-option is that the bye-laws of the societies permit such cooption and that it is always open for the societies to evolve its own mode for constitution of the Managing Committee of the society. It is primarily contended that section 74-C(3) of the said Act does not prohibit any

such provision contained in the bye-laws of the society.

5. Before adverting to the legal controversies, it may be noted that there is no dispute about the fact that the petitioner herein is a member of respondents Nos.1 to 4 societies. Respondents Nos.1 to 4 societies are specified cooperative societies. Elections to the Managing Committee of such societies are governed by the provisions contained in section 74C and Chapter XI-A of the said Act. It is also not in dispute that in so far as the bye-laws of these societies are concerned, they provide for cooption of certain number of members to the Managing Committee. In case of respondent No.1 society, bye-law No.26 provides, inter alia, that the Board may co-opt not more than two Directors. Bye-law 39(H) of respondent No.2 society also provides for cooption of two members by the Managing Committee. Bye-laws of the respondent No.3 cooperative society also permit the Managing Committee to coopt two members on the Committee. Similarly, bye-laws

of respondent No.4 society also permit co-option of two members to the Managing Committee. In short, bye-laws of all the four respondent cooperative societies permit cooption of two members to the Managing Committee. Such powers of cooption lie with the Managing Committee. It is in this background that the present petition has been filed by the petitioner. The petitioner contends that the petitioner had made representations to respondents Nos. 5 & 6 i.e. the Registrar of Cooperative Societies and the State Government regarding the illegal cooption of the members in various societies which according to the petitioner was impermissible and so held by this Court in the case of A.M.P. Co-op. Society (supra). Despite representations by the petitioner, since respondent Nos.5 & 6 took no action, the petitioner filed the present petition.

6. By an interim order dated 10th March 2006, learned single Judge of this Court relying on the ratio laid down in the case of A.M.P. Co-op. Society (supra) found it appropriate to give

certain interim directions. The learned Judge restrained respondents Nos.1 to 4 from coopting any persons as members of the Managing Committee and further restrained the said respondents from allowing anyone who is coopted from attending the meeting of the Managing Committee. It was further clarified that such directions shall not preclude the said respondents from constituting any advisory committee of the experts body in the respective fields. Respondent No.5 was directed to ensure by issuing an appropriate circular that in all specified cooperative societies even if bye-laws permit cooption, no person shall be included as members of the Managing Committee by way of cooption in view of the express bar provided under section 74C of the said Act.

7. Appearing for the petitioner, learned advocate Shri B.N.Patel submitted that the issues arising in the present petition are no longer *res integra*. He submitted that the provisions contained in section 74C(3) of the said Act do not permit any mode of constitution of the

Managing Committee of the specified cooperative society other than by way of election. Cooption, therefore, is specifically prohibited. He submitted that section 74C(3) begins with a non-obstante clause i.e. “notwithstanding anything contained in the bye-laws”. He therefore, submitted that there is no scope for debate about the non-permissibility of cooption of the members in the Managing Committee of the specified cooperative societies. He submitted that the learned single Judge of this Court in the case of A.M.P. Co-op. Society (supra) has considered all aspects of the matter and has come to a definite conclusion that despite the bye-laws providing to the contrary, no person can get entry as member of a specified cooperative society otherwise than through election.

7.1 Learned advocate for the petitioner pointed out that the validity of section 74C of the said Act has been upheld by the Division Bench of this Court in the case of Amreli Dist. Coop. Sale and Purchase Union v. State reported in 25(2)GLR

1244.

7.2 Learned counsel drew my attention to the provisions contained in sections 73, 74, 74B and 74C of the said Act to contend that combined reading of the said provisions would lead to one and only conclusion that any member of the Managing Committee of the specified Cooperative society must seek his entry only through election.

7.3 He further pointed out that even after the decision of the Hon'ble Supreme Court in the case of Zoroastrian Coop. Housing Society Ltd. v. District Registrar, Coop. Societies (Urban), (2005) 5 SCC 632, the situation in this regard has not materially changed. He pointed out that as long as the said Act or the Rules made thereunder prohibit a particular mode of constitution of Managing Committee, the bye-laws to the contrary cannot prevail. He placed reliance on the observations made by the Hon'ble Supreme Court in the case of Zoroastrian Coop. Housing Society Ltd (supra) particularly in para 20, 22 and 23 thereof.

7.4 Placing reliance on the decision of the learned

single Judge of this Court in the case of A.M.Bhutaiya v. Amreli Dist. Central Coop Bank, 1998 (2) GLR 1470, he submitted that the writ petition filed by the present petition is maintainable. The petitioner is seeking enforcement of statutory rights and therefore, the present petition would be maintainable as held by this Court in the above mentioned decision.

7.5 Learned advocate for the petitioner further submitted that the present petition is not in the nature of public interest litigation. He pointed out that the petitioner as a member of respondents Nos.1 to 4 societies has a right to urge before this Court that the affairs of the societies be conducted in a manner provided under the said Act. If there was any deviation in the constitution of the Committee, it was open for the petitioner to raise grievance about the same as a member of such societies. He further submitted that in so far as the prayer made in para 15 of the petition is in general nature and does not concern respondent Nos.1 to 4 societies, the petitioner does not press for the same in this petition. In

that view of the matter, upon the statement made by the learned advocate for the petitioner, this petition gets confined to following substantive reliefs :

> “15. (b) To hold and declare that the managing committees of respondents nos 1 to 4 are not competent and entitled to co-opt any member of their managing committees and the provisions of bye-laws as per Annexure-B and C to that effect are absolutely illegal, null and void;
>
> (c) To restrain the respondents nos.1 to 4 from co-opting any member of their managing committee by the managing committee and to restrain them form allowing any co-opted member on the managing committee to function as the member of the managing committee forthwith and permanently;
> (d) To direct the respondent nos 5 and 6 to take all necessary action and steps against all specified cooperative societies including respondent nos.1 to 4 for violating the provisions of section 74-C(3) of the Act and co-opting members on managing committee by managing committee illegally;”

8. On the other hand, learned senior advocate Shri K.G.Vakharia appearing for some of the respondent-cooperative societies and coopted members made detailed submissions opposing the petition. By way of preliminary objection, it was contended before the Court that the petition is not maintainable since respondents Nos.1 to 4 societies are not “State” within the meaning of Article 12 of the Constitution of India. It was contended that the petitioner has not laid any foundation nor produced any material on record to establish that respondents Nos.1 to 4 are State instrumentalities or agencies so as to cover under the term “State” as defined under Article 12 of the Constitution. He, therefore, contended that the petition is not maintainable.

8.1 Another preliminary objection raised by Shri Vakharia was that the petition is in the nature of public interest litigation. The petitioner has prayed for wide reliefs and sought for implementation of the decision of this Court in the case of A.M.P. Co-op. Society (supra) against all specified cooperative societies of which the

petitioner is not even a member. This petition, therefore being in the nature of public interest litigation should not be heard before this Court.

8.2 With respect to the legal controversies raised by the petitioner, learned Senior Advocate Shri Vakharia submitted that the provisions contained in section 74C of the said Act do not prohibit cooption of members to the managing committee if the bye-laws of the society so permit.

8.3 In this regard, it was contended that the bye-laws of the societies are in the nature of contractual relations between the parties. Once a person agrees to abide himself by certain terms of contract, it is thereafter not open for such a person to challenge the provisions or to seek to ignore such provisions contained in the contract unless the terms are found to be opposed to public policy as envisaged under section 23 of the Indian Contract Act. He further contended that by virtue of the bye-laws of the respective societies, which bye-laws have been approved by the Registrar, provisions are made for nomination of members to the managing committee through

cooption by the committees themselves. He submitted that such provisions are to be found in large number of co-operative societies and are in the interest of the co-operative movement. He submitted that co-option of members who are expert in the respective fields only augment the cooperative spirit and would give thrust to the cooperative movement. He submitted that such provisions for cooption cannot be ignored.

8.4 With respect to the provisions contained in section 74-C(3) of the said Act, it was contended that the same do not prohibit cooption of members to the managing committees of specified cooperative societies. He submitted that the requirement of holding election as provided under section 74C(3) of the said Act and Chapter XI of the said Act would apply only to those of the members of the committee who are required to be elected. If there are provisions which permit the co-operative societies to constitute the committee through members in addition to elected members, provisions contained in section 74C(3) of the said Act do not apply nor the same would

prohibit such mode of constitution of the committee.

8.5 He further submitted that even otherwise, on the principles of harmonious construction, it would be necessary that the provisions contained in section 74C of the said Act are interpreted in such a manner as not to preclude or prohibit cooption of members to the managing committee of the specified cooperative societies. For the above purpose, he drew my attention to various provisions contained in the said Act and the Rules made thereunder. Reference to these statutory provisions will be made at a slightly later stage.

8.6 With respect to the decision of the learned single Judge in the case of A.M.P. Co-op. Society (supra), it was contended that the same is rendered per incuriam and at any rate, by virtue of the decision of the Hon'ble Supreme Court in the case of Zoroastrian Coop Housing Society Ltd. (supra) the decision in the case of A.M.P. Co-op. Society (supra) should be treated as no longer a good law. Alternatively, it is submitted that

this Court should take a view different since according to him, certain statutory provisions contained in the said Act were not discussed by the learned single Judge while rendering the said decision.

8.7 In support of his contention that the writ petition is not maintainable, reliance was placed on the decision of the learned single Judge of this Court in the case of Rajabhai v. Member U.T.S.K.V.S. Ltd., 1976 GLR 583 wherein the learned single Judge of this Court came to the conclusion that the ratio laid down in the case of Lambha S.S.M. v. D.R. Co-op. Societies, Ahmedabad 1973 GLR 786 is not a correct proposition and the bye-laws of co-operative societies do not have statutory force.

8.8 In this regard, reliance was also placed on the decision of the Hon'ble Supreme Court in the case of Zee Tele Films Ltd v. Union of India, AIR 2005 SC 2677.

8.9 In respect of the contention that the decision in the case of A.M.P. Co-op. Society (supra) is per incuriam, the learned counsel has placed on

the decisions of the Hon'ble Supreme Court in the case of Govt. of A.P. v. B.Satyanarayana Rao, (2000) 4 SCC 262, Dy. C.S.T. v. Thomas Stephen & Co. Ltd., (1988) 2 SCC 260, and in the case of, State of UP v. Synthetics and Chemicals Ltd. (1991) 4 SCC 139. In these decisions, the Hon'ble Supreme Court has been pleased to discuss the concept of a decision having been rendered per incuriam. In the case of Government of A.P. v. B.Satyanarayana Rao (supra), it has been observed that the rule of per incuriam can be applied where the Court omits to consider a binding precedent of the same court or the superior court rendered on the same issue or whether a court omits to consider any statute while deciding that issue.

8.10 Reliance was placed in the case of Sultana Begum v. Prem Chand Jain, (1997) 1 SCC 373 wherein it is observed that the rule of interpretation requires that while interpreting two inconsistent or obviously repugnant provisions of an Act, the courts should make an effort to so interpret the provisions as to harmonise them so

that the purpose of the Act may be given effect to and both the provisions may be allowed to operate without rendering either of them otiose.

8.11 Decision in the case of Datar Switchgears Ltd. Tata Finance Ltd., (2000) 8 SCC 151 was relied upon for the purpose of explaining the concept of nomination. In para 26 of the said decision, the Hon'ble Supreme Court explained the concept of nomination as to mean, the action, process or instance of nominating or the act, process or an instrument of nominating. It is observed that nomination is equivalent to appointment when used by a mayor in an instrument executed for the purpose of appointing certain persons to office.

8.12 Reliance is also placed on the decision in the case of Director of Settlements, A.P. v. Mr.R.Apparao, (2002) 4 SCC 638 wherein the Hon'ble Supreme Court observed that under Article 141 of the Constitution, the law declared by the Supreme Court shall be binding on all courts within the territory of the country. However, what is binding is the ratio of the decision and not the findings of facts.

8.13 On the basis of the said discussion, it was sought to be urged that in the case of A.M.P.Co.op. Soc. (supra), the learned single Judge did not lay down any ratio of universal application. Reliance was placed on the decision in the case of C.K.Uplana v. Dy. Collector, 2005 (3) GLR 2672, wherein a Division Bench of this Court observed that in the case of A.M.P.Co.op. Soc. (supra), the learned single Judge was considering the impact of interpretation of section 74C of the said Act and was not referring to primary level co-operative societies.

8.14 Reliance was placed on the decision of a Division Bench of this Court in the case of N.N.Patel v. A.B.Gor, 2005 (2) GLR 1583 wherein it was observed that the a fair understanding of section 74C would make it clear that the said provisions relate to conduct of election of committees and officers of certain societies and term of office of members of the committees. On the basis of these observations, it was sought to be urged that the Division Bench found that section 74-C would not apply to cases where the

members of the committee are to be selected through means other than election.

9. Main reliance was placed on the decision of Zoroastrian Co-operative Housing Society Ltd. (supra). Learned counsel read the decision before the Court at length and submitted that by virtue of the said decision, the decision of the learned single Judge in the case of A.M.P.Co.op. Soc. (supra) has been rendered no longer good law. It was urged that the Hon'ble Supreme Court in the case of Zoroastrian Cooperative Housing Society Ltd. (supra) has recognized the primacy of the contractual relationship between a member of co-operative society and the co-operative society itself. Such contractual relationships are governed by the bye-laws constituted by the society. A member at the time of seeking membership agrees to abide himself by such bye-laws. It is thereafter not open for him to question the bye-laws themselves. It was further pointed out that in the case of Zoroastrian Co.op. Housing Society Ltd. (supra), the Hon'ble Supreme Court thus

upheld the provisions of the bye-laws of the co-operative society which confined its membership only to members of a particular community. Such provisions were upheld despite its opposition on the basis of the provisions contained in Articles 14 and 15 of the Constitution of India as well as on the basis of Article 300 of the Constitution. It was held that the bye-laws are not opposed to the public policy so as to be vulnerable to challenge on the anvil of the provisions contained in section 23 of the Indian Contract Act nor amounts to complete restriction on transfer of property so as to be opposed to the provisions contained in the Transfer of Property Act and in particular section 10 thereof. On the basis of the ratio laid down by the Hon'ble Supreme Court in the case of Zoroastrian Coop. Housing Society Ltd. (supra), it was strongly urged before this Court that since there is no express prohibition to cooption of members to the managing committees of respondents Nos.1 to 4 societies, the bye-laws must be allowed to prevail.

10. Learned advocate Shri Shirish Joshi appearing for other respondents adopted the arguments advanced by Senior Advocate Shri Vakharia and opposed the petition. In addition thereto, he submitted that the petitioner cannot seek any relief from the Court as in the past the petitioner itself had nominated members to the managing committees.

11. Learned Government Pleader Shri Sunit Shah appearing with Shri Gori pointed out that pursuant to the interim directions issued by this Court on 10th March, 2006, the Government has issued a circular dated 24th April 2006. A copy of the said circular has been placed on record. He contended that though another view is equally possible, in view of the decision of this Court in the case of A.M.P.Co.op. Soc. (supra), appointment to the managing committee of the specified cooperative society through cooption may not be permissible. He submitted that the Government will abide by the directions that this Court may give in this regard.

12. Having heard the learned advocates appearing

for the parties, it would be necessary to dispose of the preliminary contentions raised by the respondents before adverting to the central issues arising in the petition.

13. As noted earlier, an objection of the petition being heard before this Court was raised on the ground that the petition is in the nature of public interest litigation. It is true that at the time of its inception, the petition contained certain prayers with which the petitioner was not directly concerned. The petitioner had no personal interest in the question of constitution of managing committee of specified cooperative societies other than respondent Nos.1 to 4 herein. To that extent, the prayers made by the petitioner could have been termed as ones in public interest. The learned advocate for the petitioner, however, has at the outset, while hearing the petition stated that the petitioner would confine his petition to those reliefs with the petitioner is personally and directly concerned. As noted earlier, the petition, therefore, stands

confined to only some of the prayers, namely, prayer clauses para 15 (b) to (d). It is not the case of the respondents that the above mentioned prayers do not concern the petitioner. In that view of the matter, now with the limited surviving prayers in the petition, there is no scope to argue that the petition involves an angle of public interest litigation.

14. Second preliminary objection which needs to be disposed of at this stage is with respect to the maintainability of the petition. It is not in doubt that the petitioner has not laid any foundation to urge that respondents Nos.1 to 4 are “State” within the meaning of Article 12 of the Constitution. There is no material nor are there any averments to this effect. In that view of the matter, it is necessary for this Court to find out whether a writ would be maintainable in respect of the prayers made in the present petition.

14.1By virtue of the areas and the importance of activities that certain cooperative societies have

undertaken over a period of time, they have achieved considerable importance. To regulate some of the aspects of management of such societies, certain special provisions have been made in the said Act. Such societies which are referred to as specified cooperative societies under the provisions of the said Act are governed by special provisions made in the said Act. In particular section 74C of the Act and Chapter XI-A of the said Act provide that election to the members of the managing committee of such society shall be governed by the said provisions. In Chapter XI-A of the said Act, elaborate provisions have been made for conduct of elections to the members of managing committee of such societies. These provisions are substantially pari-materia with the provisions contained in the legislation governing election of State Legislatures. Detailed and elaborate provisions have been made for preparation of electoral rolls, for filing of nominations, for holding of elections, for counting of the ballots and for declaration of the results of the elections. The provisions are also

made for the purpose of resolving election disputes. Special machinery is created to hear any complaint about the election mal-practices and other election disputes. The provisions contained in Chapter XI-A also provide for offences and penalties. It can thus be seen that in a limited sphere of constitution of managing committees of the specified cooperative societies, in view of the considerable importance that such societies enjoy, it is no longer a matter of mere contract between the parties. The Legislature has intercepted and made detailed provisions to ensure that election of the committees of such societies are held in a free and fair manner. In the case of Daman Singh v. State of Punjab, (1985) 2 SCC 670 also, the Hon'ble Supreme Court recognized the concept of statutory interference with the composition of cooperative societies. In para 9 of the said decision, it is observed that “in the cases before us we are concerned with cooperative societies which from the inception are governed by statute. They are created by statute, they are controlled

by statute and so, there can be no objection to statutory interference with their composition on the ground of contravention of the individual right of freedom of association". It can thus be seen that such societies hold considerable importance in so far its constitution and management is concerned. It is in this regard, that the provisions contained in section 74-C (3) provide that notwithstanding anything contained in the bye-laws of any such society, the committee of management shall be elected by the general body of members of the society and all other committees authorized by or under the bye-laws may be constituted by electing or appointing persons from among the persons who are members of the committee of management. In the present petition, the petitioner has sought implementation of the said statutory provision. In the case of A.M. Bhutaiya v. Amreli Dist. Central Coop. Bank Ltd., 1998 (2) GLR 1740, learned single Judge of this Court observed that whether a cooperative society is an instrumentality of the State or not would depend on the nature of functions and duties of

the society, Government financing and extent of Government control and in that case, the Court found that the Amreli District Cooperative Bank is not “State” within the meaning of Article 12 of the Constitution of India. It was, however, held that writ jurisdiction of the High Court can be invoked as a public law remedy for fulfillment of public duty or obligation.

15. In view of the above discussion, I find that the petition cannot be rejected only on the ground of not being maintainable. There is yet another aspect of this issue. Respondents Nos.5 & 6 are the official respondents, i.e. the Registrar of Cooperative Societies and the Department of the State Government who are entrusted with the duty of ensuring that the provisions contained in the said Act are implemented and corresponding powers are also available with the authorities particularly in section 82 and section 160 of the said Act. Such powers have been recognized by this Court in the case of A.M.Bhutaiya v. Amreli District Central Coop. Bank Ltd (supra)

as well in the case case of Jain Merchants Cooperative Housing Society Ltd v. HUF of Manubhai Shah, (1995) 1 GLR 19 wherein the Bench was pleased to note the observations made in para 55 of the decision in the case of Amreli District Cooperative Sale and Purchase Union (supra) to the following effect:

> "In any case, an aggrieved person has always a right to move the Courts by seeking appropriate remedies by regular civil action in Civil Court or before Registrar by invoking his special jurisdiction where the membership is refused on flimsy and trivial grounds."

15.1 Under section 82 of the said Act, the Registrar has power to enforce performance of obligation of a society. It provides, inter alia, that where any society is required to take any action under the Act, the rules or the bye-laws and such action is not taken within the time provided in the Act or rules or the bye-laws or where no such time is provided, within such time as the Registrar may specify by notice in writing, the Registrar may himself or through a person

authorized by him, take such action at the expense of the society. Under the provisions of section 160 of the said Act, the Registrar enjoys certain powers to give directions to the co-operative societies. The prayers made by the petitioner also include prayers for direction to respondents Nos. 5 & 6 to ensure that the provisions contained in section 74C particularly sub-section (3) thereof are properly implemented. Surely, such directions are not out of the purview of writ jurisdiction of this Court under Article 226 of the Constitution of India. Merely on the ground of maintainability, I do not find that this petition can be rejected.

16. This brings me to the central controversy hotly debated between the parties.

16.1As noted earlier, the learned single Judge of this Court in the case of A.M.P.Co.op. Soc. (supra) has already come to the conclusion that in view of the provisions contained in section 74C(3) of the said Act, notwithstanding anything contrary to the provisions contained in the bye-

laws, it is not open for a specified cooperative society to nominate any members to the managing committee and the only mode for constitution of the managing committee of such societies would be through election. Ordinarily, as a coordinate bench, I would be bound by the ratio laid down by the learned single Judge of this Court and would have followed the ratio and given directions as found appropriate in the facts of the present case. However, the contesting respondents have strenuously urged before me that the view of the learned single Judge has been rendered per incuriam or at any rate has been rendered no longer a good law by virtue of the pronouncement of the decision of the Hon'ble Supreme Court in the case of Zoroastrian Cooperative Housing Society Ltd. (supra). Alternatively, it has also been contended that this Court should take a view different from the one taken by the learned single Judge since according to the respondents, some of the relevant provisions of the said Act and the Rules made thereunder have not been noticed by the learned single Judge.

17.At the outset, I do not think that the decision in the case of A.P.M. Coop. Society Ltd. (supra) can be termed as per incuriam. As noted earlier, the concept of per incuriam would apply where a decision has been rendered in ignorance of a binding decision on the same issue from the same Court or from the higher Court or where the judgment has been rendered without noticing the statutory provisions applicable. In the present case, neither of the two eventualities arise. It is, therefore, not possible for me to accept the contention that this Court can take a different view and hold that the decision in the case of A.M.P.Co.op. Soc. (supra) was rendered per incuriam.

18. Next question is whether by virtue of the decision of the Hon'ble Supreme Court in the case of Zoroastrian Coop. Housing Society Ltd. (supra), the decision of the learned single Judge in the case of A.M.P.Co.op. Soc. (supra) is rendered no longer good law. In the case of A.M.P.Co.op. Soc. (supra), learned single Judge of this Court came to the conclusion that

sub-section (3) of section 74C of the said Act start with non-obstante clause, namely, notwithstanding anything in the bye-laws. This would therefore mean that even if there are provisions contained in the bye-laws to the contrary, the provisions contained in section 74-C(3) of the said Act would prevail. In the case of Zoroastrian Coop. Housing Society Ltd. (supra), the question before the Hon'ble Supreme Court was with respect to the validity of the bye-laws of a Housing Cooperative Society which limited its membership only to members belonging to a particular community. Reversing the decision of the Division Bench of this Court, the Hon'ble Supreme Court found that such provisions under bye-laws cannot be termed as ones opposed to public policy. It was held that the concept of open membership also would not prevent an association of persons to decide between themselves that the membership of the society that they are agreeing would be limited only to the members belonging to a certain community. It was observed that a

particular bye-law cannot be given a go-by merely because the same may not accord with our concept of fairness or propriety in terms of the rights available to an ordinary citizen. It was observed that it may be tempting to accept that Articles 14 and 15 read in the light of the preamble to the Constitution reflect the thinking of our Constitution-makers and prevent any discrimination based on religion or origin in the matter of equal treatment or employment and to apply the same even in respect of a cooperative society. It was, however, observed that the Court must also consider what lies behind the formation of cooperative societies and what their character is and how they are to be run as envisaged by the various cooperative societies Acts. It was observed that the freedom to contract available to a citizen cannot be curtailed or curbed relying on the fundamental rights enshrined in Part III of the Constitution against State action. A right to enforce a fundamental right against State action, cannot be extended to

challenge a right to enter into a contract giving up an absolute right in oneself in the interests of an association to be formed or in the interests of the members in general of that association. The argument that such a restriction would be opposed to public policy and therefore hit by the provisions of section 23 of the Contract Act was also negatived. It was observed that for section 23 to apply, it must be forbidden by law or it must be of such a nature that it would defeat the provision of any law or it is fraudulent or it involves or implies injury to the person or property of another or the court regards it as immoral or opposed to public policy. The contention that such restriction would be opposed to transfer of property Act as the same would amount to an absolute restraint on alienation was also turned down. It was concluded that so long as the approved bye-laws stand and the Act does not provide for invalidity of such bye-law or for interdicting the formation of cooperative societies confined to persons of a particular

vocation, a particular community, a particular persuasion or a particular sex, it could not be held that the formation of such a society under the Act would be opposed to public policy and consequently liable to be declared void or the society directed to amend its basic bye-law relation to qualification for membership.

19. The ratio laid down in the case of Zoroastrian Coop. Housing Society Ltd. (supra) therefore, would be that if the bye-laws of a society restrict its membership on the ground of race, religion, region, etc., the same cannot be struck down on the ground that the same are opposed to public policy or that the same are opposed to the concepts enshrined in Articles 14 and 15 of the Constitution. It is always open for the members of the cooperative society to agree between themselves to abide by such provisions. There is, however, one rider. The central line of philosophy adopted by the Hon'ble Supreme Court in that decision is that the bye-law is not opposed to any of the provisions contained in the relevant Act. In

para 22 of the judgment, it was observed that the validity of a bye-law, that too an approved bye-law, has to be tested in the light of the provisions of the Act and the Rules governing cooperative societies. In so testing,the search should be to see whether a particular bye-law violates the mandate of any of the provisions of the Act or runs counter to any of its provisions or to any of the rules. In para 23, it was further observed that unless appropriate amendments are brought to the various Cooperative Societies Acts incorporating a policy that no society shall be formed or if formed, membership in no society shall be confined to persons of a particular persuasion, religion, belief or region, it could not be said that a society would be disentitled to refuse membership to a person who is not duly qualified to be one in terms of its bye-laws. The Hon'ble Supreme Court in para 36 further observed that the question is whether there is anything in the Gujarat Cooperative Societies Act and the Gujarat Cooperative Societies Rules restricting

the rights of citizens to form a voluntary association and get it registered under the Cooperative societies Act confining its membership to a particular set of people recognized by their profession, their sex, their work or the position they hold or with reference to their beliefs, either religious or otherwise. It was observed that it was not contended that there is any provision in the Gujarat Cooperative societies Act prohibiting the registration of such a cooperative society. In para 37, it was further observed that so long as the approved bye-law stands and the Act does not provide for invalidity of such a bye-law or for interdicting the formation of cooperative societies confined to persons of a particular vocation, etc. it would not be held that the formation of such a society under the Act would be opposed to public policy.

20. It can thus be seen that in the case of Zoroastrian Coop. Housing Society Ltd. (supra), the Hon'ble Supreme Court found that when there is no express provision in the Act or in the

Rules framed thereunder against any bye-law, limiting the membership of the society on the basis of community, such a bye-law cannot be ignored. It was held that the same would not be opposed to public policy nor can it be voided on the principles contained in Articles 14 and 15 of the Constitution.

21. In my view, therefore, the decision of the Hon'ble Supreme Court in the case of Zoroastrian Coop. Housing Society Ltd. (supra) does not change materially the situation so far as the present petition is concerned. The question still at large would be whether in face of the provisions contained in the said Act, any bye-law which envisages cooption of certain number of members to the managing committee of a specified cooperative society can prevail. In other words, the question is, if the bye-law of a specified cooperative society is opposed to the provisions contained in section 74C(3) of the said Act, whether the same can be implemented. In that view of the matter, I am unable to agree with the suggestion

of the learned senior advocate Shri Vakharia that by virtue of the decision of the Hon'ble Supreme Court in the case of Zoroastrian Cooperative Housing Society Ltd. (supra), the decision of the learned single Judge in the case of A.M.P.Co.op. Soc. (supra) has been rendered no longer good law.

22. This brings me to the question whether the decision in the case of of A.M.P.Co.op. Soc. (supra) requires a re-look or reconsideration.

23. Sub-section (2) of section 2 of the said Act defines bye-laws to mean bye-laws registered under the Act and for the time being in force and include registered amendments of such bye-laws. Sub-section (5) of section 2 of the said Act defines “Committee” so as to mean the committee of management or other directing body, to which the management of the affairs of a society is entrusted. Section 4 of the said Act provides for registration of the societies and reads as follows:-

> “4. Societies which may be registered: A society, which has as its object the

> promotion of the economics interests or general welfare of its members or of the public, in accordance with co-operative principles or a society established with the object of facilitating the operations of any such society, may be registered under this Act:
>
> Provided that it shall not be registered, if in the opinion of the Registrar, it is economically unsound, or its registration may have an adverse effect upon any other society, or it is opposed to, or its working is likely to be in contravention of public policy."

Section 6 of the said Act provides for conditions of registration. Section 8 of the said Act provides for application for registration and the manner in which the same has to be made. Section 9 of the said Act provides for registration including provisional registration. Section 13 of the said Act pertains to amendments of bye-laws of the societies. Sub-section (1) thereof provides that no amendment of bye-laws of the society shall be valid until registered under the said Act.

23.1Section 14 of the said Act provides for the power of the Registrar to direct amendment of the bye-laws under certain circumstances. Sub-section (1) thereof provides, inter alia, that if it appears to the Registrar that an amendment of the bye-laws except in respect of the name or objects of a society is necessary or desirable in the interest of such society, he may call upon the society in the prescribed manner to make the amendment within such time as he may specify.

23.2 Section 73 of the said Act provides that subject to the provisions in the Act and the Rules, the final authority of every society shall vest in the general body of members in general meeting, summoned in such a manner as may be specified in the bye-laws.

23.3 Section 74 of the said act pertains to Committee, its powers and functions. It, provides, inter alia, that the management of every society shall vest in a committee, constituted in accordance with the Act, the rules and bye-laws which shall exercise such powers and perform such duties as may be conferred or imposed on it by the

Act, the rules or the bye-laws. It may, however, be noted that the proviso to section 74 of the said Act has been declared unconstitutional by the Division Bench of this Court in the case of Amreli District Coop. Sale & Purchase Union (supra).

23.4 Section 74B of the said Act provides for reservation of seats on committees of certain societies for Scheduled Castes and Scheduled Tribes and small and marginal farmers. Section 74C of the said Act pertains to provisions for conduct of elections of committees and officers of certain societies and term of office of members of committee. Section 74C reads as follows:-

> “74C. Provision for conduct of elections of committees and officers of certain societies and term of office of members of committee:-
>
> 1. The election of members of the committees and of the officers by the committee, of the societies of the categories mentioned below shall be subject to the provisions of Chapter XI-A and shall be conducted in the manner laid down by or under that Chapter:-
>
> (i) Apex societies mentioned in the Schedule and such other Apex Societies as the State Government may, by general or special

order, published in the Official Gazette, from time to time specify in this behalf, having regard to financial position and share capital of such societies;

(ii) all District Central Cooperative Banks;

(iii) all Primary Land Development Banks;

(iv) (a) all District Cooperative Sale and Purchase Organisation;

(b) all Taluka Co-operative Sale and Purchase Organisation;

(v) all Cooperative Sugar Factories

(vi) all Cooperative Spinning Mills;

(a) all district co-operative milk unions;

(b) all taluka cooperative processing societies;

(vii) any other society or class of societies, which the State Government may, by general or special order published in the Official Gazette, from time to time specify in this behalf, regard being had to the financial position and share capital of such institutions;

2. When the election of all the members of the committee of any such societies held at the same time, the members elected on the committee at such general election shall hold office for a period of three years from the date on which the first meeting is held and shall continue in office until immediately

before the first meeting of the members of the new committee.

3. Notwithstanding anything in the bye-laws of any such society, the committee of management shall be elected by a general body of members of the society and all other committees authorized by or under the bye-laws may be constituted by electing or appointing persons from among the persons who are members of the committee of management, and all such committees shall be sub-committee of the committee of management, and shall be subordinate to it.

Provided that it shall be lawful for the State Government;

(a) to nominate its representatives on a Committee of any such society under section 80 or

(b) to nominate the first Committee of Management of any such society where the bye-laws of such society so provide

Provided further that it shall be lawful for anybody or authority to nominate its representative on a Committee of such society where the bye-laws of such society so provide.”

Chapter XIA of the said Act provides for election of committees and officers of certain societies. As per section 145A, provisions of Chapter XIA are

applicable to election to committees of societies belonging to the categories specified in section 74C. As per definition of clause (c) of section 145B, “specified society” means a society belonging to any of the categories specified in section 74C. Sections 145C to 145Z of the said Act make detailed provisions with respect to conduct of elections. The Collector is given power to hold such elections through returning officer and other officers as may be appointed by him. Provisions are made for disqualification of membership, regarding corrupt practice, regarding scrutiny of voting, regarding penalties and offences, etc.

23.3. Section 145D of the said Act in particular provides that voting on every election shall be by secret ballot. Sub-section (2) of section 145D provides that where a society has to send a nominee as a member of the committee of the specified society, the election of such nominees shall be conducted under the control of the Collector of the District in which the registered office of the society sending the nominee is

situated. Sub-section (4) of section 145D, however, provides that no election shall be held in the case where under the bye-laws of a specified society, the Government nominee or the nominee of a Financing Agency becomes a member of the committee of the society. Relevant portion of section 145D reads as under:

> “145D. Conduct of elections:-
>
> 1. xxxx
>
> 2. In all cases, where a society has to send a nominee as a member of the committee of the specified society, the election of such nominee shall be conducted under the control of the Collector of the District in which the registered office of the society sending the nominee is situated.
>
> 3. xxxxx
>
> 4. No election shall be held in the csae where under the bye-laws of a specified society the Government nominee or the nominee of a Financing Agency becomes a member of the committee of the society.”

Rule 5 of the Gujarat Cooperative Societies Rules deals with bye-laws of the society. Clause (n) of sub-rule 2 of rule 5 of the Gujarat Cooperative Societies Rules requires that the society shall make

bye-laws on the matter regarding constitution and election of the managing committee and its powers and duties.

23.4 Gujarat Specified Cooperative Societies Elections to Committees Rules 1982 makes detailed provisions for conduct of elections to the committees of specified societies in terms of the section 74-C of the said Act.

24. On the basis of these statutory provisions, learned Senior advocate Shri Vakharia has submitted that the provisions of sub-section (3) of section 74C of the said Act must be limited only to such of the members of the committee which are to be elected and only with respect to such members the provisions are to be applied and the election be held as per the provisions contained in Chapter XI-A of the said Act. It is contended that if the bye-laws permit any mode other than election of the members, such bye-laws cannot be given a go-by.

25. As noted above, sub-section (3) of section 74C

of the said Act starts with non-obstante clause and provides that notwithstanding anything contained in the bye-laws of any specified society, the committee of management shall be elected by a general body of members of the society. The constitution of managing committee of a specified co-operative society, therefore, has to be by way of election as provided in the said Act and the Rules framed thereunder. Proviso to sub-section (3) of section 74C of the said Act however, saves two kinds of nominations. It provides, that it shall, however, be lawful for the State Government to nominate its representative on a Committee of any such society under section 80 or to nominate the first Committee of management of any such society where the bye-laws of such society so provide. It may be noted that under section 80 of the said Act, the State Government enjoys certain powers to appoint its nominee under certain circumstances. Under sub-section (1) of section 80 of the said Act, the State Government has power to nominate three representatives on

the committee of society where the State Government has subscribed to the share capital of a society directly or through another society or has guaranteed the repayment of the principal of and payment of interest on debentures issued or loans raised by the society. Under sub-section (2) of section 80 of the said Act, nomination is permissible for the State Government if it is of the opinion that having regard to the public interest involved in the operation of a society, it is necessary or expedient so to do.

25.1 Proviso to sub-section (3) to section 74C of the said Act, therefore, saves two kinds of nominations to the managing committee of specified cooperative societies. As noted earlier, first kind is of nomination by the Government under section 80 of the said Act and second situation where the nomination has been saved is where the first committee of management of any such society is to be formed through nomination where by-laws of such society so provide.

25.2 One may also notice that further proviso to

sub-section (3) of section 74C of the said Act provides that it shall be lawful for any body or authority to nominate the representative on a Committee of such society where the bye-laws of such society so provide.

25.3 It would thus appear that though sub-section (3) of section 74C of the said Act provides that a committee of management of the specified cooperative society shall be elected by general body or members, the same however, makes exceptions with respect to powers of the State Government to make nominations under section 80, nomination of first committee of management where bye-laws of the society so provide and nomination by any body or authority of its representatives on a committee of such society where the bye-laws of such society so provide.

26. The provision of sub-section (3) of section 74C when read in light of the proviso and the further proviso framed by the Legislature would make it amply clear that the constitution of the managing committee of the specified cooperative society has to be by election of

members elected by the general body of the society. This would be so irrespective of any provision to the contrary found in the bye-laws of the society. By virtue of the provisions contained in the said Act and the language used, where sub-section (3) of section 74C is sought to be given overriding effect over any other provisions in the bye-laws of the society, it must be held that the provisions contained in the said sub-section would operate and prevail even where the bye-laws of the society provide otherwise.

In the case of Shin-etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd., (2005) 7 SCC 234, while giving a dissenting judgment on other issues, Hon'ble Mr Justice Y.K.Sabharwal explained the purpose of introduction of non-obstante in a statutory provision. The Hon'ble Supreme Court also considered the effect of expression “shall” used by the Legislature in a statutory provision. The following observations of the Hon'ble Supreme Court may be noted:

“26. A non obstante clause is a legislative

device which is usually implied to give overriding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some other enactment, that is to say, to avoid the operation of all contrary provisions. {Union of India and Anr. v. G.M. Kokil and Ors.”

xxxx

“28. The words 'shall' and 'unless' appearing in Section 45 mandates that before referring the parties to arbitration, the judicial authority should be satisfied that the arbitration agreement is not null and void, inoperative or incapable of being performed. In Brace Transport Corporation of Monrovia, Bermuda v. Orient Middle East Lines Ltd., Saudi Arabia and Ors. [1995 Supp (2) SCC 280 at 286] this Court held :

"The court of a contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of Article II shall upon the request of one of the parties, refer to arbitration, unless it finds the agreement is null and void, inoperative or incapable of being performed."

29. If the requirements of a statute which prescribes the manner in which something is to be done are expressed in negative

language, that is to say, if the statute enacts that it shall be done in such a manner and no other manner, it has been laid down that those requirements are in all cases absolute , and that neglect to attend to them will invalidate the whole proceeding. (Craies on Statute Law, 7th Edn., at p.263."

In the case of State of Bihar v. Bihar Rajya M.S.E.S.K.K. Mahasangh, (2005) 9 SCC 129, the Hon'ble Supreme Court made following observations:

"45. A non obstante clause is generally appended to a section with a view to give the enacting part of the section, in case of conflict, an overriding effect over the provision in the same or other Act mentioned in the non obstante clause. It is equivalent to saying that inspite of the provisions of the Act mentioned in the non obstante clause, the provision following it will have its full operation or the provision embraced in the non obstante clause will not be an impediment for the operation of the enactment or the provision in which the non obstante clause occurs (See principles of statutory interpretation, 9th Edn., by Justice G.P.Singh; Chapter V, Synopsis IV at pp.318 & 319.)

The provisions of section 74C(3) besides starting with a non-obstante clause also provides that the Committee of management (of a specified co-operative society) shall be elected. The word “shall” is also significant and reveals the mandatory character of the requirement. Notwithstanding any other contrary provisions contained in the bye-laws of a specified cooperative society, therefore, the constitution of its managing committee has to be by election by a general body of members of the society. I am unable to uphold the contention of the learned advocate Shri Vakharia that the said provision applies only to such of the members who as per the bye-laws are required to be elected. Nothing stated in sub-section (3) of section 74C would permit this Court to make a distinction between the members of the managing committee of a specified cooperative society who are required to be elected and those who are not. To my mind, the only meaning that sub-section (3) of section 74C of the said Act can receive is that the managing committee of a cooperative society has to be constituted by election by general body of the

members of the society. Exceptions culled out to this rule have been laid down in the sub-section itself. Such exceptions include powers of the Government to nominate members under section 80 of the said Act, to nominate any member to the first committee if the bye-laws of the society so provide and the powers of any body or authority to nominate its representatives on committee of such society where the bye-laws of the society so provide. I do not see any conflict between the provisions of sub-section (3) of section 74C of the said Act vis-a-vis the provisions contained in section 74 of the said Act. Section 74 of the said Act provides, inter alia, that the management of every society shall vest in a committee constituted in accordance with the Act, Rules and Bye-laws. It may be noted that section 74 of the said Act applies to all co-operative societies whereas special provisions have been made under section 74C of the said Act which apply only to specified cooperative societies. Provisions contained in sub-section (3) of section 74C of the said Act for constitution of the managing committee of specified cooperative society, therefore, are in

the nature of exception to general rule contained in section 74 of the said Act applicable to all cooperative societies where the section provides that the committee of the society would be constituted in accordance with the Act, Rules and the Bye-laws. I see no apparent conflict between the two provisions. Section 74 of the said Act also provides for constitution of the committee in accordance with the the Act, Rules and Bye-laws and in so far as the specified cooperative societies are concerned, provisions are made in section 74C of the said Act. By virtue of non-obstante clause used in sub-section (3) of section 74C of the said act, any provisions contrary contained in the bye-law shall have to yield to the extent the same is repugnant to the provisions contained in sub-section (3) of section 74C.

27. At this stage, one may also notice that under section 74B of the said Act, reservation is made in favour of members of Scheduled Castes and Scheduled Tribes and small and marginal farmers on the committees of certain societies. Such societies are those which the State Government by general or special order direct.

In such societies, two seats are to be reserved for Scheduled Castes, Scheduled Tribes and small and marginal farmers. Sub-section (2) of section 74B of the said Act provides that where any of such reserved seats is not filled by election or appointment, the committee shall fill such seat by co-option of a member on the committee from amongst other members. The question therefore would arise as to what would be the constitution of the committee, if a specified cooperative society is also ear-marked by the State Government for reservation in favour of Scheduled Castes and Scheduled Tribes and small and marginal farmers under section 74B of the said Act. In such a case, though ordinarily such reserved seats would also be filled by election, in case of failure of the general body to elect two members of these categories, sub-section (2) would operate and permit co-option of the members to the committee from amongst other members. If such a society happens to be a specified cooperative society, despite provisions contained in sub-section (3)

of section 74C of the Act, such cooption may not be impermissible. This would be so since the cooption is envisaged in the statutory provision and not as per the bye-laws of the society. This would be the only manner in which through harmonious interpretation, the provisions contained in section 74B and section 74C can be reconciled.

28. In the case of Ali M.K. v. State of Kerala, AIR 2003 SC 4006, the Hon'ble Supreme Court considered the roll of a proviso in a statute and following observations were made in this regard.

> “10.The normal function of a proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. As was stated in Mullins v. Treasurer of Survey (1880 (5) QBD 170, (referred to in Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subhash Chandra Yograj Sinha (AIR 1961 SC 1596) and Calcutta Tramways Co. Ltd. v. Corporation of Calcutta (AIR 1965 SC 1728); when one finds a proviso to a section the natural presumption is

that, but for the proviso, the enacting part of the section would have included the subject-matter of the proviso. The proper function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main enactment and its effect is confined to that case. It is a qualification of the preceding enactment which is expressed in terms too general to be quite accurate. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment and ordinarily, a proviso is not interpreted as stating a general rule. "If the language of the enacting part of the statute does not contain the provisions which are said to occur in it you cannot derive these provisions by implication from a proviso." Said Lord Watson in West Derby Union v. Metropolitan Life Assurance Co. (1897 AC 647) (HL). Normally, a proviso does not travel beyond the provision to which it is a proviso. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other. (See A. N. Sehgal and others v. Raje Ram Sheoram and others (AIR 1991 SC 1406); Tribhovandas Haribhai Tamboli v. Gujarat Revenue Tribunal and others (AIR 1991 SC 1538) and Kerala State Housing Board and others v. Ramapriya Hotels (P) Ltd. and others (1994 (5) SCC

672) : (1994 AIR SCW 3297)

It can be seen that though clause (a) to first proviso to sub-section (3) of section 74C of the said Act may be in the nature of a clarificatory clause, in so far as clause (b) to proviso is concerned, the same culls out an exception from the main body of sub-section which to my mind would only emphasise that the nomination is otherwise not permissible. Further proviso to sub-section (3) of the section 74C would augment and highlight this aspect of the matter.

29. Though learned counsel Shri Vakharia made an attempt to suggest that even in further proviso to sub-section (3) of section 74C of the said Act, the committee would have power to make nomination through cooption, I am afraid, such a contention cannot be accepted. The further proviso applies to body or authority to nominate its representatives on a committee of a society where the bye-laws of such society so provide. The term “nomination” has been used by the Legislature and not “cooption”. Under sub-

section (2) of section 74B of the said Act, on the other hand, the word used is “co-option” when the power is given to the committee itself to appoint a member of a reserved category if the general body of the society fails to elect such a member. The Legislature has, therefore, advisedly, used the terms 'nomination' and 'co-option' at different places which would surely have different meanings. Nomination is referred to when body or authority is permitted to send its nominee as a representative on a committee. When the committee is empowered to appoint a person through selection as member of the committee, the term used is “co-option”. Obviously, there cannot be a representative of the committee on the committee itself and in that sense, the further proviso to sub-section (3) of section 74C of the said Act would never include the managing committee of a society in the term body or authority. In Sweet & Maxwell Wharton's Law Lexicon, Fourteenth Edition, term “nomination” has been described as the act of mentioning by name; especially he power of

appointing. In Webster's Third New International Dictionary, word “nomination” is described an act or right of designating by name for an office or duty. On the other hand, word “coopt” in the same dictionary has been described as to choose or elect into a body or group as a fellow member (outside persons may be co-opted to committees). These terms “nomination” and “co-option” otherwise also carry slight different meanings. This contention of the counsel also needs to be turned down.

30. It was also contended by learned counsel Shri Vakharia that interpreting provisions of section 74C(3) of the Act in a manner overriding the provisions contained in the bye-laws of the society for cooption of members of the committee would render the said statutory provision ultra vires the Constitution. He submitted that the attempt of the Court should be to uphold the vires of the statutory provisions and the provisions should, therefore, be read down in such a manner as the constitutional validity thereof is not jeopardized. Reliance was placed

on the decision of the Hon'ble Supreme Court in the case of Dharam Dutt v. Union of India, (2004) 1 SCC 712 wherein the Hon'ble Supreme Court has discussed the principles governing the question of constitutional validity of a statute. The contention of the learned counsel need not detain this Court for long primarily because the constitutional validity of section 74C of the said Act is not under challenge before this Court. Additionally, as noted earlier, challenge to the vires of the said section had been turned down by a Division Bench of this Court in the case of Amreli District Cooperative Sale and Purchase Union (supra). The question, therefore, cannot be gone into in this petition since section 74C of the said Act has already been held to be constitutionally valid.

31. In conclusion, quite apart from the fact that on the principle of judicial precedence I am bound by the decision of the learned single Judge,independently also, I do not find any reason to take a different view since I also

come to the same legal conclusions. There is, therefore, no case for reference to a larger bench made out.

32. In the result, I find that the petition is required to be allowed. The following directions are therefore given:

(a) It is provided that the managing committee of respondent Nos.1 to 4 societies are not competent to co-opt any member in such committee and current cooption is held to be illegal and unlawful.

(b) Any members who are coopted members of the managing committee of these societies shall cease to enjoy such membership forthwith.

(c) Managing committees of respondents Nos.1 to 4 shall not make nominations of any coopted members to the committee in future also.

(d) Respondents Nos. 5 & 6 shall ensure that these directions are properly complied with so far as the above mentioned societies are concerned.

Rule is made absolute to the above extent with no order as to costs.

32.In view of the order passed in the main matter, the Civil Application does not survive and the same is disposed of accordingly.

(Akil Kureshi, J.)

(vjn)